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No. 90-7477

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

WILLIAM LEWIS SMITH,

Petitioner

v.

RICHARD LANHAM, ET AL.

Respondents

RESPONDENTS VICTOR, TURNER, HALL, BROWN JACKSON AND WILKINS' BRIEF IN OPPOSITION TO PETITIONER WILLIAM LEWIS SMITH'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Turner and Correctional Officers
R. Hall, R. Brown, Jackson and
Wilkins

QUESTION PRESENTED

Whether an informal appellate brief filed pursuant to Local Rule 34(b) of the United States Court of Appeals for the Fourth Circuit satisfies the requirement of a Notice of Appeal as set forth in Federal Rule of Appellate Procedure 3(c)?

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STATEMENT OF THE CASE

Correctional Officers Sergeants R. Victor and Arnold Turner and Corporals R. Hall, R. Brown, Jackson and Wilkins,[1] accept Mr. Smith's Statement of the Case as supplemented and corrected by Dr. Barry's Statement of the Case filed in his Respondent's brief.

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[1] These Correctional Officers are the parties submitted as parties to this Court by Mr. Smith in his petition before this Court. In this Court's May 7, 1991 letter to counsel, and in Smith's Petition, the caption of the case appears as William L. Smith v. Lanham, Comm'r., et al.. Nowhere in this case does Mr. Lanham appear as a party. He is presently the Commissioner of the Division of Correction but at the time of the incident Jon P. Galley was the Commissioner of the Division of Correction and a named party in the court below. Mr. Smith now appears to have released Mr. Galley, Mr. Collins, Mr. Carpenter, and Drs. Ellis and Porecki from any further proceedings in this matter.

REASONS FOR DENYING THE WRIT

I. Introduction.

Petitioner presents no substantial reasons why this Honorable Court should grant a Writ of Certiorari. Because the Fourth Circuit correctly resolved the matter and because the specific facts relating to the appellate procedure do not make this an appropriate case for this Court's consideration, further review is unwarranted.

II. This Court's analysis of the requirements of the Federal Rules of Appellate Procedure 3 and 4.

This Court recently addressed the requirements of Federal Rule of Appellate Procedure 3(c) in Torres v. Oakland Scavenger Company, 487 U.S. 312, 108 S.Ct. 2405 (1988). Federal Rule of Appellate Procedure 3 provides in relevant part:

> Rule 3. **Appeal as of Right - How Taken.**
>
> (a) **Filing the Notice of Appeal.** An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. . . .
>
> * * * *
>
> (c) **Content of the Notice of Appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. . . .

Torres holds that where a Petitioner does not file a Notice of Appeal and thus fails to comply with the specificity requirements of Rule 3(c), such failure presents a jurisdictional bar to the appeal. Id. at 2409.

Mr. Smith contends that the 1979 amendment to Rule 3(c) which added that an appeal "shall not be dismissed for informality of form or title of the notice of appeal", justifies his position that the court should accept the informal brief as the "functional equivalent" of a notice of appeal. Reliance for this position is also cited as Foman v. Davis, 371 U.S. 178 (1972). Reversing the appellate court's refusal to hear the appeal in Foman, this Court established an important principle that the requirements of the Federal Rules of Procedure should be liberally construed and that "mere technicalities" should not stand in the way of consideration of a case on its merits. Id. at 181. In Foman, a wholly separate provision of Rule 3(c) was addressed which required that any notice of appeal designate the judgment and the order or part thereof appealed from.

However, as this Court stated in Torres, "[p]ermitting imperfect but substantial compliance with a technical requirement is not the same as waiving the requirement altogether as a jurisdictional threshhold." Id. at 2408. Rules 3 and 4 combine to require that a notice of appeal be filed with the Clerk of the District Court within the time prescribed for taking such an appeal. In United States v. Robinson, 361 U.S. 220 (1960), this Court reasoned that because the timely filing of a notice of

appeal is mandatory and jurisdictional, that compliance with the provisions of these rules is of the utmost importance. As stated in Torres:

> [A]lthough a court may construe the rules liberally in determining whether they have been complied with, it may not waive the jurisdictional requirement of Rules 3 and 4 even for "good cause shown" under Rule 2 if it finds that they have not been met.

Torres, 108 S.Ct. at 2409.

Mr. Smith places substantial reliance on the "functional equivalent" language set forth in Torres. However, what is contemplated under this Court's functional equivalent analysis is that the court not resort to mere technicalities to deny the appeal. See also Foman v. Davis, supra. The Fifth Circuit followed this reasoning in Fischer v. United States Dep't. of Justice, 759 F.2d 461, 464 (5th Cir. 1985), where it ruled that the "motion for leave to proceed in forma pauperis" is the substantial equivalent of a notice of appeal and is effective to invoke appellate jurisdiction. This Court also recognized cases where a letter from a prisoner to a judge suffices as a notice of appeal. See Torres, 108 S.Ct. at 2408, n.2. The Sixth Circuit found that a pro se motion for a certificate of probable cause is the functional equivalent of a notice of appeal. McMillian v. Barksdale, 823 F.2d 981 (6th Cir. 1987).

In the instant case, Smith, while acting pro se, filed his notice of appeal on March 22, 1988, after a Motion for Judgment Notwithstanding the Verdict had been filed but not yet ruled upon. In his notice of appeal he designated that his appeal was from an Order of the District Court entered on March 15, 1988,

which in fact only referred to a granting of an extension of time for his attorneys to file a Request for Attorneys' Fees and not the actual judgment that was entered on February 29, 1988. But for the Motion for Judgment Notwithstanding the Verdict, Smith's notice of appeal filed on March 22, 1988 was both timely filed and would be considered to be in substantial compliance (or the functional equivalent) to satisfying the requirements of Rule 3(c) despite the error in reference to the wrong order. This is an example of the liberal construction encouraged in Foman and Torres.

Permitting such liberal construction is a far cry from the expansive reading that Smith now urges upon this Court in this case. Smith requests this Court to rewrite the appellate rules in order to accept an informal brief as the equivalent of a notice of appeal. In other words, Mr. Smith's position would essentially waive either the notice of appeal requirement altogether or eliminate the requirement of filing a separate informal brief in accordance with Rule 31(c). The Federal Rules of Appellate Procedure set forth certain requirements that litigants must follow in pressing their appeals. Failure to comply with such rules, such as filing a brief, may result in dismissal of the appeal for failure to prosecute. Julien v. Zeringue, 864 F.2d 1572, 1574 (Fed. Cir. 1989).

Collapsing two formal stages of appellate procedure into one clearly goes beyond any legislative intent of the Rules. Justice Scalia states in his concurring opinion in Torres "[b]y definition all rules of procedure are technicalities; sanction

for failure to comply with them always prevents the court from deciding where justice lies in the particular case, on the theory that securing a fair and orderly process enables more justice to be done in the totality of cases." Torres, 108 S.Ct. at 2410.

III. Various Circuit Court Analysis on Whether an Appellate Brief Satisfies the Notice of Appeal Requirement Set Forth in Rule 3(c).

The question of whether an appellate brief satisfies the notice of appeal requirement as set forth in Rule 3(c) was first addressed in 1965 in Frace v. Russell, 341 F.2d 901 (3rd Cir. 1965). In an extremely summary fashion, the Third Circuit treated a prisoner's "Brief for Appeal" both as a common notice of appeal and as an application for certificate of probable cause. The court presented no reasoned approach but rather provided an expeditious handling of a jurisdictional matter in order to affirm the case on the merits, ruling that petitioner failed to exhaust his available state remedies.

In 1989 the Ninth Circuit construed Allah's "opening brief" as a notice of appeal. Allah v. Superior Court of the State of California, 871 F.2d 887 (9th Cir. 1989). The Ninth Circuit went to great lengths to discuss that there was no separate document for the entry of judgment and therefore the brief could be filed essentially at any time. The Ninth Circuit focused on the fact that the appellate brief "fulfilled all the purposes of the notice of appeal" 871 F.2d at 889-90, but failed to consider that such reasoning would collapse two stages of appellate procedure into one. Furthermore, the Ninth Circuit neither referred to the

Frace decision nor distinguished the ruling from the Eleventh Circuit decision in Florida Women's Medical Clinic, Inc. v. Smith, 706 F.2d 1172 (11th Cir. 1983), infra.

In Florida Women's Medical Clinic, Inc. v. Smith, the Eleventh Circuit stated:

> Appellant contends that it actually filed a notice of appeal in a timely manner, because its brief, subsequently filed, set forth all the facts which normally would be contained in a notice of appeal. Appellant cites no authority for the proposition that a court may eliminate entirely the requirement for the filing of a notice of appeal.

Id. at 1173. Similarly, in United States v. Cooper, 876 F.2d 1192 (5th Cir. 1989), the first case which presented a reasoned analysis and discussed the earlier cases, the Fifth Circuit addressed the question before this Court. It recognized the conflict between Frace and Florida Women's Clinic, holding:

> Faced squarely with the issue, we now determine that an appellate brief will not substitute for a notice of appeal, even if it otherwise meets the requirements of Fed. Rules App. P. 3 and 4. The Federal Rules of Appellate Procedure envision the notice of appeal and appellate briefs as two separate filings. To collapse the two into one would, as the Eleventh Circuit implied, "eliminate entirely the requirement of the filing of the notice of appeal." (Citation omitted)

Id. at 1196. Cooper is cited in a 1990 Federal Circuit case in a footnote wherein the court held that the appellate brief cannot substitute for a notice of appeal. Jurgens v. Makasy, 905 F.2d 382 (Fed. Cir. 1990).

In sum, the Fourth Circuit joins the Fifth, the Eleventh and the Federal Circuits in finding that an appellate brief cannot substitute for a notice of appeal. The Third Circuit in a 1965

decision and the Ninth Circuit in a 1989 decision, neither of which discusses any conflicting cases nor present any real analysis as to rationale behind their holding, hold to the contrary.

IV. The Underlying Facts Surrounding Mr. Smith's Attempt to File His Notice of Appeal Further Underscore that Further Review by this Court is Unwarranted

As the Fourth Circuit stated, "the normal solicitude afforded to pro se litigants is greatly diminished, even if not erased, in this case." Smith v. Galley, 919 F.2d 893, 896 (4th Cir. 1991). Smith's counsel, who had been appointed to represent Smith in the district court, informed Smith in a letter dated April 21, 1988 that Smith must file an appeal on or before May 13, 1988 to effect a timely notice of appeal since the order denying the Motion for Judgment Notwithstanding the Verdict was not entered until April 13, 1988. Smith never followed this advice nor provided any justification for his failure to do so. Such failure should not be rewarded; the facts are simply not appropriate for review by this Court.

CONCLUSION

Petitioner presents no valid reasons why this Honorable Court should grant the Petition for Writ of Certiorari. Because the court below correctly examined the Federal Rules of Appellate Procedure 3 and 4 and found that the Rules envisioned that a notice of appeal and appellate brief constituted two stages of the appellate procedure and because Mr. Smith was dutifully

informed that he still needed to file a timely notice of appeal, further review by this Honorable Court is unwarranted.

Respectfully submitted,

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WILLIAM LEWIS SMITH,	*	IN THE
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of June, 1991, Respondents Victor, Turner, Hall, Brown, Jackson and Wilkins' Brief in Opposition to Petitioner William Lewis Smith's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in the above-captioned case was mailed, postage prepaid to the Court, and two copies thereof were mailed, postage prepaid, to: Steven H. Goldblatt and Cynthia S. Mazur, Appellate Litigation Clinical Program, Georgetown University Law Center, 111 "F" Street, N.W., Washington, D.C. 20001-2095, Counsel for Petitioner, and to David H. Bamberger and Glenn K. Allen, Piper and Marbury, Charles Center South, 36 South Charles Street, Baltimore, Maryland 21201, Counsel for Respondent Dr. Wayne S. Barry.

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